In the Supreme Court of the United States.

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS,
vs.
THE LAKE ERIE & WESTERN RAILOAD COMPANY.

To the Honorable, the Chief Justice and Associate Justices of said Court:

Your petitioner, the Lake Erie & Western Railroad Company respectfully shows to the Court:

1. In this case the Circuit Court of Appeals for the Seventh Circuit has certified to this Court for decision the question of the constitutionality of a certain statute of the State of Indiana, popularly known as the Employers' Liability Statute, approved March 4, 1893 (Acts of 1893, page 294), as more fully appears from said certificate in the words and figures following:

CERTIFICATE TO SUPREME COURT.

Before Woods, Jenkins and Showalter, Circuit Judges.

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow-servant, for which the defendant in error is alleged to be responsible by force of an act of the Legislature of Indiana, approved by the Governor of the State, March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to the Session Laws of 1893, page 294. Burns' Annotated Indiana Statutes, revision of 1894, paragraphs 7083 to 7087, inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute

mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid, or violates the fourteenth amendment of the Constitution of the United States the Court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER.

Your petitioner further shows that in the record of said case in the Circuit Court of Appeals, it appears,

1. That the verdict in said case was rendered on the 20th day of November, 1896, for the defendant, being at the November term, 1896.

2. That on the 23d day of November, 1896, at the same term, on defendant's motion, judgment for costs was rendered on said verdict in favor of defendant.

3. That on the 26th day of April, 1897, at the same term, plaintiff without calling the attention of the Court to the same filed in the Clerk's office his motion for a new trial, with written reasons therefor.

4. That on the first day of June, 1897, being at the May term, 1897, said motion was overruled by the Court, plaintiff excepting, and sixty days were given plaintiff to file his bill of exceptions.

5. The facts touching the rendition of the verdict and all proceedings subsequent thereto in the Circuit Court are shown by the following, being the last two pages of the bill of exceptions, as the same is found in the transcript of the proceedings of the Circuit Court hereto attached, at page 45, as follows, to wit:

"And thereupon the jury again retired, and after further deliberations, returned into court their verdict for the defendant.

"Be it further known, that the verdict as appears by the record was rendered in this cause on November 21, 1896, and judgment was entered thereon on November 23, following.

"There is no rule of this court regulating the time within which motions for new trials shall be filed, or making any provision for, or in regard to such motion; nor is there any rule or custom or practice in regard to the time after verdict for rendition of judgment thereon.

"On September 27, 1892, the Circuit Court of the United States for the District of Indiana adopted the following rule:

"'Rule 34. *Ordered*, That all motions, demurrers and exceptions hereafter filed must be supported by written or printed briefs, to be filed in duplicate with such motion, demurrer or exception. Failure to file such briefs shall be deemed a waiver of such motion, demurrer or exception. If oral argument is desired by the party, he shall request it at the time of filing his briefs. The adverse party shall have fifteen days after the briefs of the moving party are filed, in which to file answering briefs in duplicate.

"'If such party desires an oral argument, if must be requested at the time of filing his briefs. When any motion, demurrer or exception is filed, accompanied by briefs, the clerk shall forthwith notify the adverse party thereof.'

"After the rendition of the judgment, no further action was had at the November term, 1896, until April 26, 1897, when the plaintiff filed in the Clerk's office, the court being then in session, his motion and reasons for a new trial, and written briefs in compliance with the rule, one copy of which was placed on file with the motion and the other was properly served upon the defendant's attorneys, but this motion for a new trial, or the fact that it had been filed or attempted to be filed in the Clerk's office was not brought to the notice of the Court or the Judge thereof until on or about the 26th day of May, 1897, and after the November term of court had expired. The plaintiff's attorneys filed the motion and a brief in the Clerk's office, and the entry was made as appears of record. The motion was not ruled on at that term, nor was any time asked or given by special order or otherwise beyond the term to file a bill of exceptions, nor was any stay of judgment asked or given with a view to further proceedings.

"During the trial all the proceedings were reported by the official stenographer; exceptions were taken from time to time and allowed, and no limitation was made by the Court in allowing an exception as to the time when the exceptions should be written out and presented for signature.

"On May 26, 1897, the defendant's attorneys filed an answering brief on the motion for a new trial, in the Clerk's office, and a copy was served on the plaintiff's attorneys.

"Neither party in their briefs asked for an oral argument, and therefore on the day defendant's attorneys filed their brief, or very shortly afterwards, the Clerk brought to the Judge in chambers the motion for a new trial, with the briefs of attorneys, this being the first notice to the Court or Judge of the existence of such motion; and the said motion was overruled June 1, 1897, exceptions allowed and sixty days given in which to file a bill of exceptions, at the request of plaintiff's attorney, but with the statement to him at the time in the opinion of the Judge such exception and bill would be of no avail to raise any question of error.

"Shortly afterwards, and during the early part of June, plaintiff's attorneys prepared a bill of exceptions and served a copy on defendant's attorneys.

"Certain amendments were made thereto by the defendant's attorneys which were accepted by the plaintiff's attorneys. Thereupon they presented the bill of exceptions for signature.

"The defendant's attorneys object to the Judge signing the bill of exceptions on two grounds:

"*First.* That on the facts of the case it is now too late, and the Court has no power to sign a bill of exceptions.

"Plaintiff's attorneys insist that in this case it is presented in due time.

"*Second.* The defendant's attorneys further insist that it is now too late to take or sue a writ of error, as more than six months have elapsed since the entry of the judgment on the 23d day of November, 1896; while plaintiff's attorneys insist that it is within the time, as it should be computed from the overruling of the motion for a new trial.

"The Court, therefore, deems it best that the foregoing statement should be embodied in the bill of exceptions. And now, within said time, the plaintiff presents this his bill of exceptions, which is examined and found to be a full, true and correct bill of exceptions, and the same is allowed and signed by said Judge presiding in said court, and the same is made a part of the records of said court in said cause.

"JOHN H. BAKER,

"July 10, 1897. *Judge.*"

And the following showing the petition for the writ of error and its allowance:

"PETITION FOR WRIT OF ERROR.

"Now comes Hosea B. Tullis, plaintiff herein, and says that heretofore, to wit, on the 23d day of November, 1896, this Court entered judgment herein in favor of the defendant and against this plaintiff, and overruled his motion for a new trial on June 1, 1897; in which judgment and the proceedings, and prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which more in detail appear from the assignment of errors, which is filed with this petition.

"Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of errors so

complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

"HOSEA B. TULLIS.

"LANGDON & COFFROTH,
"A. C. HARRIS,
"*Attorneys for Plaintiff.*

"Allowed this 10th day of July, 1897, over the objection and exception of the defendant.

"JOHN H. BAKER,
"*Judge.*"

Petitioner further shows that in the Circuit Court of Appeals it moved to dismiss the writ of error and to strike out the bill of exceptions, because neither was taken in due time. But your petitioner shows that in certifying the constitutional question to this court for decision, the Circuit Court of Appeals has held that the bill of exceptions was taken and the writ of error was sued out in due time, notwithstanding the fact, undisputed, that said bill of exceptions was neither filed nor tendered at the term at which the judgment was rendered, nor until nearly eight months after such judgment; and notwithstanding the motion for a new trial was not filed until April 26, 1897, five months and three days after the judgment was rendered, and notwithstanding it was not brought to the attention of the Court, nor did the Court know such motion had been filed until May 26, 1897, six months and three days after judgment, and notwithstanding no leave was given beyond the trial term to file a bill of exceptions, and the same was not filed till July 10, 1897, nor tendered until the early part of June of the same year, and notwithstanding the writ of error was not sued out until July 10, 1897.

Your petitioner further shows that the statute of limitation as to such appeals by the judiciary, act of 1891, reads as follows:

"Section 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

That it has been held that when a motion for a new trial or a petition for a rehearing has been seasonably presented to and entertained by the Court, the effect of such presentation and consideration is to suspend the running of the limitation pending such consideration.

But it is submitted that, in no case has such latitude of construction been given to the limitation either as to filing bills of exceptions or suing out writs of error, as in the case at bar; that the effect of the construction here given is to wholly unsettle the practice as to bills of exceptions and to make the limitation as to writs of error nearly twelve, instead of six months, in direct violation of the plainly expressed will of Congress. The result is, in every case instead of a certain and definite rule of limitation, we will have such a varying limitation as may meet the views of the Court in that case.

Your petitioner presents herewith a correct transcript of the entire record of this case, both in the Circuit Court and the Circuit Court of Appeals.

Wherefore your petitioner prays the Court to order this entire case to be certified to this court for hearing and decision, to the end that this question of practice may be settled authoritatively and a uniform rule established, and your petitioner will ever pray, etc.

And petitioner files a brief in support of this petition.

Respectfully submitted,

JOHN B COCKRUM,
W. H. H. MILLER and
JOHN B. ELAM,
Attorneys for Petitioner.

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

455

HOSEA B. TULLIS, PLAINTIFF IN ERROR,

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

INDEX.

	Original.	Print.
Special appearances for Defendant in Error	1	3
Appearances for Plaintiff in Error	2	4
Stipulation as to time for filing briefs	3	5
Order of December 20, 1897, extending time in which to file briefs	4	5
Order of January 3, 1898, setting cause for hearing	5	6
Order of January 5, 1898, re-setting cause for hearing	6	6
Motion to dismiss writ of error, etc.	6	7
Supplementary motion to dismiss writ of error	7	8
Hearing	9	9
Motion for writ of certiorari	10	9
Affidavit of A. C. Harris in support of motion	11	10
Order of February 26, 1898, that writ of certiorari issue	12	11
Writ of certiorari	12	11
Return to writ of certiorari	14	12
Assignment of cross-errors	15	13
Certificate to the Supreme Court of the United States	17	14

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Room, in the city of Chicago, on Monday, the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six, and of our independence the one hundred and twenty-first.

And afterwards, to wit: On the twentieth day of September, 1897, in the October term aforesaid, came the defendant in error by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed their special appearance in the office of the Clerk of said court, said special appearance being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 455. October Term, 1896.

HOSEA B. TULLIS,
Plaintiff in Error,

v.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

The Clerk will enter my special appearance as counsel for the defendant in error, for the purpose of moving, strike out bill of exceptions and dismissing the writ of error.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM.

Note.—Must be signed by a member of the bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual, and not firm names, must be signed.

Endorsed: Filed Sep. 20, 1897.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty-seventh day of September, 1897, in the October term aforesaid, came the plaintiff in error by his counsel, Mr. A. C. Harris, Mr. B. W. Langdon and Mr. U. R. Coffroth, and filed in the office of the Clerk of said court their appearance, said appearance being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 455. October Term, 1896.

HOSEA B. TULLIS,
Plaintiff in Error,

v.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

The Clerk will enter my appearance as counsel for the appellant.

A. C. HARRIS,
B. W. LANGDON,
U. R. COFFROTH.

Note.—Must be signed by a member of the bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual, and not firm names, must be signed.

Endorsed: Filed Sep. 27, 1897.

OLIVER T. MORTON, *Clerk.*

At a regular term of the United States Circuit Court of Appeals, for the Seventh Circuit, begun and held at the United States court room, in the city of Chicago, on Monday, the fourth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our independence the one hundred and twenty-second.

And afterwards, to wit: On the twentieth day of December, 1897, in the October term last aforesaid, there was filed in the office of the Clerk of said court a stipulation in said cause, said stipulation being in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455. Stipulation as to filing briefs.

It is hereby stipulated that the appellant shall have until the first day of January, 1898, to file his brief, and the appellee until the fifteenth day of February, 1898.

A. C. HARRIS,
Attorney for Appellant.
MILLER & ELAM,
Attorneys for Appellee.

Endorsed: Filed December 20, 1897.
OLIVER T. MORTON, *Clerk.*

And afterward, on the same day, to wit: On the twentieth day of December, 1897, in the October term last aforesaid, in the record of proceedings in said entitled cause, appears the following entry, to wit:

MONDAY, December 20, 1897.

Before Hon. William A. Woods, Circuit Judge.

HOSEA B. TULLIS *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Upon filing of stipulation of counsel, it is ordered by the Court that the time for filing brief of plaintiff in error in this cause, be, and the same is hereby, extended to January 1, 1898, and that the time for filing of brief for defendant in error be, and the same is hereby extended to February 18, 1898.

And afterwards, to wit: On the third day of January, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

MONDAY, January 3, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

It is now here ordered that this cause be, and the same is hereby set down for hearing, Thursday, January 20, 1898.

And afterwards, to wit: On the 5th day of January, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, January 5, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

It is ordered by the Court that this cause be, and the same is, hereby reset down for hearing, February 25, 1898.

And afterwards, to wit: On the 21st day of January, 1898, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John B. Cockrum, Mr. W. H. H.

Miller and Mr. John B. Elam, and filed its motion to dismiss writ of error or to strike out bill of exceptions, said motion being in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

SEVENTH CIRCUIT.

October Term, 1897.

HOSEA B. TULLIS
vs.
THE LAKE ERIE & WESTERN RAILROAD COMPANY. } No. 455.

MOTION.

The defendant in error, specially appearing for that purpose only, moves the Court:

First. To dismiss this writ of error because the same was not taken within six months after the entry of the judgment.

Second. If the writ of error is not dismissed, then defendant in error moves to strike from the record the bill of exceptions, because the same was not presented or filed at the trial term, nor until nearly eight months after the judgment was entered.

JOHN B. COCKRUM,
W. H. H. MILLER AND
JOHN B. ELAM,
Attorneys for Defendant in Error.

Endorsed: Filed January 21, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty fourth day of February, 1898, in the October term last aforesaid, came the defendant in error by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed its supplementary motion to dismiss writ of error in the office of the Clerk of said court, said supplementary motion being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

HOSEA B. TULLIS *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

SUPPLEMENTARY MOTION TO DISMISS WRIT OF ERROR.

The defendant in error moves to dismiss this writ of error for the further reason:

That this Court has no jurisdiction of appeal because the action of the plaintiff depends solely on the act of the Legislature of Indiana of 1893 (Act 1893, page 294; R. S. 1894, section 7083), making the master liable to an employe for the acts of a co-employe, the validity of which act is challenged and denied by defendant as a violation of the fourteenth amendment to the Federal Constitution.

The act is a denial to the defendant of the equal protection of the law, in that while some "persons" are exempt from liability to one employe by reason of the negligence of a co-employe, others, including defendant, under the same conditions are denied such exemption.

Under these circumstances the right of review is in the Supreme, not in this Court.

Supplement to Revised Statutes U. S., page 903, section 5.

The case involves:

1. The construction and application of the Constitution of the United States.

2. The law of the State is claimed to be in contravention of the Constitution of the United States.

The case is, therefore, clearly one of which, if this question has to be decided, the Supreme Court has exclusive jurisdiction.

City of Indianapolis *vs.* Central Trust Co., 83 Fed. Rep. 529.

The argument against the constitutionality of this statute is in our brief on the merits on file in this case.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM,
Attorneys for Defendant in Error.

Endorsed: Filed February 24, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty-fifth day of February, 1898, in the October term aforesaid, the following further proceedings, were had and entered of record, to wit:

FRIDAY, February 25, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY.
} No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Now this day came the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Addison C. Harris, counsel for plaintiff in error, and by Mr. W. H. H. Miller, counsel for defendant in error, and the Court having heard the same, takes this matter under advisement.

And afterward, to wit: On the twenty-sixth day of February, 1898, in the October term aforesaid, came the plaintiff in error, by his counsel, Mr. Addison C. Harris, and filed in the office of the Clerk of said court, his motion for a writ of certiorari, which said motion was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

HOSEA B. TULLIS, *Plaintiff in Error*,
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY, *Defendant in Error.*
} Motion for Certiorari.

Hosea B. Tullis, the plaintiff in error, respectfully shows unto the Court that at the close of the November term, 1896, of the

Circuit Court of the United States for the District of Indiana, the Court made an order adjourning all pleas, plaints and proceedings of every kind whatsoever, undetermined, over into the succeeding term, to wit: The term beginning the first Tuesday in May, 1897. That it is material and necessary to the understanding of this case on appeal that said adjourning order should be made and be a part of the record herein. That the Clerk of the said Circuit Court omitted and failed to certify said adjourning order as a part of the record by him certified into this court in said cause.

Wherefore, the said plaintiff in error moves the Court to make proper order upon the Clerk of said Circuit Court, with due speed, to certify said adjourning order into this court that the same may be made a part of the record herein.

Respectfully submitted,

HOSEA B. TULLIS,
By A. C. HARRIS.

STATE OF ILLINOIS, }
COOK COUNTY. } ss:

Addison C. Harris, being duly sworn upon his oath, says that he is the attorney for the plaintiff in error and makes this affidavit for and in his behalf and that the matters set forth in the said motion and petition are true as he verily believes.

A. C. HARRIS.

Subscribed and sworn to before me this
(SEAL) 26th day of February, A. D. 1898.

OLIVER T. MORTON,
Clerk U. S. Circuit Court of Appeals for the Seventh Circuit.

Endorsed: Filed February 26, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, on the same day, to wit: On the 26th day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

SATURDAY, FEBRUARY 26, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY.
} No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Upon the reading and filing of affidavit, and upon motion of Mr. Addison C. Harris, counsel for plaintiff in error, that writ of certiorari issue in this cause directed to the Clerk of the Circuit Court of the United States for the District of Indiana, it is now here ordered that writ of certiorari issue forthwith.

And afterwards, on the same day, to wit: On the twenty-sixth day of February, 1898, in the October term last aforesaid, there was issued out of and under the seal of the United States Circuit Court of Appeals a writ of certiorari directed to the Clerk of the Circuit Court of the United States for the District of Indiana, said writ of certiorari being in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the District of Indiana, greeting:

Whereas, in a certain suit in said Circuit Court of the United States for the District of Indiana, between Hosea B. Tullis, plaintiff, and the Lake Erie & Western Railroad Company, defendant, which suit was removed to the United States Circuit Court of Appeals for the Seventh Circuit, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested that the following, which is of record in said Circuit Court, is omitted from said transcript:

An order of the Circuit Court of the United States for the District of Indiana, entered at the close of the November term,

1896, adjourning all pleas, plaints and proceedings of every kind whatsoever, undetermined, over and into the succeeding term, to wit: The term beginning the first Tuesday in May, 1897.

You are therefore and hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said United States Circuit Court of Appeals for the Seventh Circuit, so that you have the same, together with this writ, before the said United States Circuit Court of Appeals for the Seventh Circuit forthwith.

WITNESS THE HONORABLE MELVILLE W. FULLER, Chief Justice of the United States, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, to wit: On the first day of March, 1898, in the October term last aforesaid, there was filed in the office of the Clerk of said court the return to the writ of certiorari, which said return was in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Indiana.

November Term, 1896, Monday, May 3, 1897, before Honorable John H. Baker, Judge.

General Continuance:

Ordered by the Court that all plaints and proceedings depending in said court, and not specially continued, be, and the same are hereby, continued until the next term of this court.

And the court doth now adjourn until the first day of the next term thereof.

UNITED STATES OF AMERICA, DISTRICT OF INDIANA, } ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for said District, do hereby certify that the above and foregoing are full and true copies of the general continuance and adjourning order made and entered in said court

on the 3d day of May, 1897, as fully as the same appear upon the records now in my office.

Witness my hand and the seal of said court at In-
(Seal.) dianapolis, in said District, this 28th day of February, A. D., 1898.

NOBLE C. BUTLER, *Clerk.*

Endorsed: Filed March 1, 1898.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the 7th day of March, 1898, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed in the office of the Clerk of said court its assignment of cross-errors, which said assignment was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, 1897.

HOSEA B. TULLIS	
vs.	No. 455.
LAKE ERIE & WESTERN RAILROAD COMPANY.	

ASSIGNMENT OF CROSS-ERRORS.

The defendant in error, the Lake Erie & Western Railroad Company, comes, asks leave to file an assignment of cross-errors, and, leave being given, assigns cross-errors on the record in this case in this, to wit:

That the trial court erred in overruling its demurrer to the second paragraph of the complaint herein, to which ruling the defendant at the time excepted. See transcript, page 14.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM.
Attorneys for Defendant in Error.

Endorsed: Filed March 7, 1898.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the 7th day of April, 1898, in the October term last aforesaid, there was filed in the office of the Clerk of said court the certificate of the court to the Supreme Court of the United States, said certificate being in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

No. 455—January Session, A. D. 1898.

HOSEA B. TULLIS, *Plaintiff in error,* *vs.* THE LAKE ERIE & WESTERN RAILROAD COMPANY.	Error to the Circuit Court of the United States for the District of Indiana

CERTIFICATE TO SUPREME COURT.

Before WOODS, JENKINS and SHOWALTER, *Circuit Judges.*

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow servant, for which the defendant in error is alleged to be responsible by force of an act of the Legislature of Indiana approved by the Governor of the State March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when

such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, Revision of 1894, paragraphs 7083 to 7087 inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid

the judgment should be affirmed. The question whether that statute is valid or violates the fourteenth amendment of the constitution of the United States the court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 18, inclusive, contain a true copy of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Hosea B. Tullis vs. The Lake Erie & Western Railroad Company, No. 455, October Term, 1896, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Seventh Circuit.

United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this sixth day of October, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.